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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff in Error,

vs.

INMAN, POULSEN LUMBER COMPANY,  
a corporation,  
Defendant in Error.

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**SUPPLEMENTAL BRIEF OF DEFENDANT  
IN ERROR**

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Upon Writ of Error to the District Court of the United  
States for the District of Oregon.

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No. 2687

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By leave of Court, we submit the following supplemental brief:

Omitting further formal statement of the allegations contained in the second amended complaint, it appears therefrom that the plaintiff is suing the defendant for the value of timber cut in the winters of **1901-1902** on 40 acres of land described in the complaint.

The suit is based upon an alleged claim of right secured to plaintiff by the Act of Congress of **JULY, 1898.**

The land in question from which the timber was cut was within the place limits of the grant to the Northern Pacific Railroad Company of **1864**.

The definite location of the line of railroad of the Northern Pacific Railroad Company opposite the land from which the timber was cut was fixed in **1882**.

A patent was issued by the United States Government to the Northern Pacific Railroad Company to the land in **1895**.

William N. Stanley, who cut the timber from the land and sold same to respondent, made homestead application therefor in 1896, which homestead application was **DENIED**.

The Secretary of the Interior of the United States listed the land for relinquishment in **1905**.

The Northern Pacific Railroad Company conveyed the land to the United States Government in **1907**, the United States Government accepting said deed on **JANUARY 3, 1908**.

A homestead application of William N. Stanley was allowed **JANUARY 28, 1908**.

William N. Stanley relinquished said entry **APRIL 6, 1908**.

The foregoing discloses the material dates in chronological order important to this appeal, with this exception: On January 29, 1908 (date above referred to), said William N. Stanley submitted proof that he had made and filed a homestead application for the

land December 30, 1896 (date mentioned above), and in which said application he alleged settlement and residence thereon since the year **1891** (second amended complaint, paragraph IV).

The foregoing exception embraces the point in appellant's case which is: That the listing of the land for relinquishment in **1905**, AFTER THE TIMBER WAS CUT, related back to and took effect as of **JULY 1, 1898**, BEFORE THE TIMBER WAS CUT, by reason of the alleged residence and occupation of the premises in 1891 by Stanley, such residence and occupation constituting a dispute between Stanley and the Northern Pacific Railroad Company sufficient for the application of the Act of July 1, 1898.

STATE OF THE RECORD IN 1891 WHEN  
STANLEY IS ALLEGED TO HAVE ENTERED  
UPON THE PREMISES, AND WHEN THE ACT  
OF JULY 1, 1898 WAS PASSED.

1891 is the year of the initial right, if any can be said to have ever existed in Stanley, whereby the act of July 1, 1898 could be made to apply to this case. At this time Congress had granted to the Northern Pacific Railroad Company various odd sections of land dependent for identification upon the location of the company's line of railroad, and in 1882 the Railroad Company had located its line opposite this land, had filed in the proper department maps and surveys of its right of way, had performed all of the acts necessary in order to entitle it to a patent to such land as was affected by the grant of 1864, and the land in question, with other lands in a like situation, **HAD BEEN WITHDRAWN FROM ENTRY AS PUBLIC LAND**

WHEN STANLEY IN 1891 IS SAID TO HAVE ENTERED THEREON.

It is established law that the right of the Railroad Company to a patent for such lands was fixed as of the date of location of its line of railway and the filing of its maps and surveys in the proper department, so that the record of title to this land in and following the year 1882, and including the date of the alleged settlement by Stanley, was analogous to settlement by an intending homesteader upon land open for public entry, who, pursuing to a conclusion the rights obtained by his settlement, secures a patent from the Government, which patent relates back to the date of his settlement. SO THAT IT APPEARS FROM THE COMPLAINT IN THIS CASE THAT STANLEY WAS A MERE TRESPASSER IN 1891.

Again, when the Act of 1898 was passed, a patent had been issued by the United States Government to the Northern Pacific Railroad Company, and the Northern Pacific Railroad Company had absolute title of record to the land in question upon which there was not a shadow of cloud. In 1896, Stanley made his homestead application, which was of necessity denied, SO THAT WHEN THE ACT OF 1898 WAS PASSED, THE TITLE TO THE LAND WAS NOT IN DISPUTE, AND IT REMAINED ABSOLUTE IN THE NORTHERN PACIFIC RAILROAD COMPANY.

Continuing the analysis, the timber was cut in the winters of 1901 and 1902, MORE THAN FIVE YEARS AFTER STANLEY'S APPLICATION HAD BEEN DENIED, AND FROM THREE TO FOUR YEARS AFTER THE ACT OF 1898 HAD BEEN

PASSED, during which time the title to the land remained in the Northern Pacific Railroad Company absolutely clear of cloud of any kind.

### PURPOSE OF ACT OF JULY 1, 1898.

This act has been freely commented upon in the briefs heretofore filed, but we will presume here to state the substance of the history leading up to its enactment.

The grant to the Railroad Company of 1864 had defined the Eastern terminus as "some point on Lake Superior in Minnesota or Wisconsin," and in 1882, the Railroad Company transmitted to the Secretary of the Interior a map of definite location covering the proposed line from a point near Duluth, Minnesota, to Ashland, Wisconsin. This map was approved, AND THE LANDS EMBRACED BY IT WERE WITHDRAWN FROM SALE OR ENTRY.

The Board of Directors of the Railroad Company adopted a resolution in 1884 declaring ASHLAND to be the eastern terminus of the road, which resolution was accepted by the Secretary as establishing such terminus.

In 1896, the Secretary ruled that DULUTH, not Ashland, was the eastern terminus, and that, therefore, the grant of 1864 did not embrace ANY LANDS between Duluth and Ashland; the company's list of selections was cancelled, and the LANDS OPENED FOR SALE AND ENTRY, after which the defendants in the case of *Humbird v. Avery*, 195 U. S., page

480, located and made entries on the lands between Duluth and Ashland.

Thereafter, and in 1898, before the Act of July 1, 1898, was passed, the Supreme Court of Wisconsin held that ASHLAND, and not Duluth, was the eastern terminus of the railway, this decision being contrary to the ruling of the Interior Department in 1896, which judgment of the Supreme Court of Wisconsin was affirmed by the Supreme Court of the United States and as a result, as stated by Justice Harlan in the case of *Humbird v. Avery*, supra:

“Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers, both sides claiming under the United States. *The disputes had arisen out of conflicting orders or rulings of the Land Department*, and it became the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders.”

and the distinguished Jurist further states in this case:

“In the light of that situation, Congress passed the act of 1898.”

WERE THE DIFFERENCES BETWEEN STANLEY AND THE NORTHERN PACIFIC RAILROAD COMPANY WITHIN THE PURVIEW OF THE ACT OF 1898?

The facts set forth in the complaint as to the “dispute” between Stanley and the Northern Pacific

Railroad Company when read in the light of the foregoing statement of facts giving rise to the enactment of July 1, 1898, makes it clear that this dispute was to say the least, not an "aggravated" one, and, from the fact of the denial of Stanley's application in 1896, this entry and application did not, and in law could not, have received the serious consideration of the Department.

The unwarranted, unlawful entry of Stanley in 1891, in face of the record showing that the Northern Pacific Railroad Company had fulfilled all of the requirements of the law and was thereby entitled to its patent, was, as stated above, the act of a mere trespasser. The act of the department in denying his application in 1896 was in full conformity with law and an actual adjudication that Stanley was a mere trespasser, and had no rights in the premises. There were no conflicting decisions or rulings of the Department. There were no acts of the department which could in any wise mislead Stanley whereby a reasonable dispute could have been engendered between him and the Railroad Company, and a mere abstract physical entry upon the land by Stanley had been declared by the Department in 1896 worthless in law.

**THE LAW OF 1898 WAS NOT INTENDED TO REVIVE AND LEGALIZE UNLAWFUL AND UNREASONABLE CONDITIONS CREATED BY A MERE TRESPASSER.**

It was hinted in the argument, nowhere suggested in the brief of opposing counsel, that the action of the Department in 1905, in listing the land for relinquishment by the Railroad Company, was an adjudication of Stanley's good faith and cannot be attacked col-

laterally here, and under certain conditions this would be true; but in the case at bar the complaint has presumed to set out all of the acts of the parties whereby and by reason of which it is claimed by the appellant that the Act of July 1, 1898, applies to the history of of the title to the land in question; it is from that statement of facts we argue that the Act of July 1, 1898, cannot affect the title to this land, because the complaint shows and relies upon the facts from which it is claimed Stanley's "dispute" with the Railroad Company was a substantial one and his entry in 1891 made in good faith.

In other words, the brief of opposing counsel brings the issue directly before the Court as a matter of law as to whether the facts alleged in the complaint are sufficient to show that the law of July 1, 1898, passed for the purpose of the adjustment of disputes between settlers and the Railroad Company, should be invoked to adjust an alleged dispute between Stanley and the Railroad Company.

The question cannot arise here then as to whether or not the decision of the Secretary in listing this property is conclusive; indeed, it is only by inference, as will be seen from reading the paragraph at the top of page 18 of the transcript, that opposing counsel allege this relinquishment to have been under the Act of July 1, 1898.

Should it be claimed that the events subsequent to cutting the timber as set forth in the complaint beginning with the listing of the property by the Secretary and continuing with the deed from the Railroad Company to and its acceptance by the Government, the allowance of homestead entry of Stanley and relinquish-

ment thereof by him to the appellant, would as a matter of law bring this case within the Act of July 1, 1898, we earnestly urge that the appellant cannot rely upon any act prior to the listing by the Secretary, and that up to that time the record was clear, showing absolute title in the Northern Pacific Railroad Company.

### PROVISIONS OF ACT OF 1898 AND ELECTION OF SETTLER THEREUNDER.

Paragraph 2 provides in substance that the settler in good faith may refuse to transfer his entry made upon any disputed territory, whereupon the Railroad Company shall be entitled to select in lieu of such land an equal quantity elsewhere.

Paragraph 6 provides that the settler may relinquish his claim of entry upon land in disputed territory, in which event he, the settler, shall obtain in lieu thereof other public lands.

These two paragraphs determine that the selection by the settler is a pre-requisite to the right of the Secretary to list the lands for relinquishment. The complaint does not allege that Stanley made an election of his right to retain or surrender the land, but it does charge that he cut the timber in the winters of 1901 and 1902, and it is argued that the cutting of the timber is the election by Stanley.

The opinion of the Secretary of the Interior in the case of the Northern Pacific Railroad Company v. Huston, the quotation from which appears on page 12 of appellant's brief, is to the effect only that the settler is estopped from making any other selection. In the

Huston case the settler had denuded the land of its timber and attempted to surrender it, the land, which would leave the land diminished in value in the Railroad Company, and the Department very properly held that this could not be done on the ground that the settler had estopped himself from surrendering this and acquiring other public land by his own act of destroying the value of the first tract by cutting the timber therefrom.

In the case at bar, the record discloses that the act of cutting the timber, which appellant claims to be the election by Stanley, was performed while the title of the land was in the Northern Pacific Railroad Company free from any act of selection prior to said cutting, and the timber was removed from the land by Stanley and sold before any overt act of the Secretary of the Interior was performed looking to listing the land for relinquishment, thus bringing the case directly within one point of the decision in the case of *United States v. Loughrey*, 172 U. S. 206.

The Loughrey case arose out of the following facts: The United States Government had granted to the State of Michigan certain lands for the purpose of constructing certain railroads, and there was contained in the Act a provision as follows:

“If any of said road is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.”

The timber from certain lands within this grant was cut after the ten years had expired, but before any act of Congress reverting the lands to the United

States had been passed. After considering matters to which we will refer hereafter, and directly upon the point which we are now attempting to make, Mr. Justice Brown, speaking for a majority of the Court, says:

“Conceding all that is contended for by the plaintiffs with respect to the revestiture of the *title* to the *lands* by this Act, it does not follow that the title to the *timber* which had been cut in the meantime was also revested in the United States. As was said in *Schulenberg v. Harri-*  
*man*, the title to the timber remained in the State after it had been severed; *but it remained in the State as a separate and independent piece of property; and if the State had elected to sell it, a good title would have thereby passed to the purchaser notwithstanding the subsequent act of forfeiture. It did not remain the property of the State as a part of the land, but as a distinct piece of property, although the State took its title thereto through and in consequence of its title to the lands. From the moment it was cut, the State was at liberty to deal with it as with any other piece of personal property.*”

The timber, the value of which constitutes the subject of this action, was cut while the land appeared upon the records in the name of the Northern Pacific Railroad Company, and we insist that at the time of its cutting, under the holding in the Loughrey case, was the property of the Northern Pacific Railroad Company, could be sold by that company, and the destruction of the timber, or the recovery of the amount for which it was sold at the time the timber was removed from the land, constituted a cause of action in

the Northern Pacific Railroad Company and not in the appellant AT THE TIME THE TIMBER WAS CUT AND REMOVED FROM THE LAND, and unless this cause of action has been transferred to the appellant, the revestiture of the TITLE to the land in the appellant does not transfer the cause of action.

The reasoning of the Department in the case of the Northern Pacific Railroad Company v. Huston and upon which the appellant relies in this feature of the case, is that the settler having reduced materially the value of the land by cutting the timber, is estopped from exchanging it for other public lands, and the Railroad Company is not compelled to retain a tract of land the value of which has been so materially reduced. In other words, when the Department declared that Stanley had made his election by the cutting of the timber, thus diminishing the value of the land, and by reason thereof listed it for relinquishment by the Railroad Company, IT DID SO UPON THE PRESUMPTION THAT THE LAND HAD BEEN DENUDED OF ITS TIMBER—THE TIMBER HAD BEEN REMOVED FROM THE LAND AND NO LONGER FORMED A PART OF IT.

After the timber was cut from the land, the Railroad Company and Stanley might have agreed that the Railroad Company should retain the land, in which event it would not have been listed.

Hence, up to the time of listing the land for relinquishment, we earnestly urge that the title to the land was in the Northern Pacific Railroad Company absolutely, and that, therefore, as in the Loughrey case, the title to the timber was in the Northern Pacific Railroad Company and had not thereafter by any conveyance

or act of the Department in relinquishing the title to the land been conveyed to the appellant. In other words, the Government by declaring the cutting of the timber to be Stanley's election under the Act recognized the removal of the timber while the title to the land was in the Northern Pacific Railroad Company, and it has taken no steps to acquire that title from the Railroad Company.

Further, we would urge that the act of cutting the timber, while very properly estopping the settler from obliging the Railroad Company to retain the land, should not be accepted or declared by a court as notice where the rights of third parties have intervened, or, more correctly speaking, where innocent purchasers have been involved in the transaction. The selection by the settler in order to put the Act of 1898 in operation so as to affect all other persons than himself, should be made in some form or other a MATTER OF RECORD in order that the proceedings whereby the settler's rights and the Railroad Company's rights are determined may be said to have been initiated, and to which all subsequent proceedings may be said to have relation; it seems inequitable to charge this respondent, an innocent purchaser, with the value of timber cut from Government land WHEN AT THE TIME OF THE CUTTING THE LAND HAD BEEN PATENTED BY THE GOVERNMENT TO THE RAILROAD COMPANY, and no record of a cloud upon that patent appearing in the Department or accessible to this respondent.

As stated in our original brief, the Government did not perform any act in connection with the relinquishment for seven years after the passage of the Act of

July 1, 1898, and for more than two years after the removal of the timber from the land.

There was a condition of the title at the time this timber was cut that had been confirmed by a decision of the Department in 1896, and had not otherwise been disturbed for twenty years from 1882, the time of the definite location of the railroad. The respondent had proceeded upon the assumption that the land in question was not public land, and in face of the record up to the time of listing by the secretary we insist that the appellant should not now be allowed to claim that it was government land at a time when its own patent was in effect and before it made a substantial record of the possibilities that it might thereafter become public land.

It is extending the doctrine of *lis pendens* beyond reason, as the theory upon which the title relates back to a date prior to the date of the deed is that the proceedings between the initiatory act and the final act of completing title are matters of record and in the nature of proceedings *pendente lite*, and therefore notice to all persons.

THE APPELLANT IS ASKING THIS COURT TO HAVE THE DEED OF THE NORTHERN PACIFIC RAILROAD COMPANY AND ITS ACCEPTANCE BY THE APPELLANT TO RELATE BACK AND TAKE EFFECT DURING A PERIOD WHEN THE PATENT ISSUED BY THE APPELLANT ITSELF WAS IN FULL FORCE AND EFFECT.

## DOCTRINE OF RELATION.

Much has been said in the brief of appellant about the doctrine of relation, but the conclusions of opposing counsel extend this doctrine beyond the limits of any case referred to in their brief, or in the opinion of Justice Brown in the Loughrey case.

Our contention is that the doctrine of relation as applicable to this case cannot go back further than the first record made in the Department of the Interior of the United States; that that record is the initial record whereby the possible rights of the Government under the application of the Act of July 1, 1898, to this particular piece of land, was published to the world, which was the date of the listing by the Secretary of the Interior of this land for relinquishment.

There is no better collection of cases defining this doctrine of relation than that contained in the brief of counsel for appellant and in the opinion of Justice Brown in the Loughrey case.

Respondent does not ask this Court to go as far in its application of the doctrine of relation as does the decision of the Supreme Court of the United States in the Loughrey case. In the Loughrey case the granting act itself provided for the forfeiture, and the Supreme Court declined to extend the act forfeiting the land and revesting the title in the Government back to the date of the expiration of the ten years within which time the railroad should be constructed so as to give a right of action for timber cut on the land after the expiration of the ten years and before the Act of Congress revesting the title in the Government.

How much more clearly would the principle of

such a ruling apply to this case. The Act of July 1, 1898, gave the settler certain rights under certain conditions and provided simply the procedure whereby those rights could be established. The application of the Act to any particular tract of land was dependent upon the act of the Department for the law did not of itself establish any right of the settler or the Government in any particular tract of land until the land was listed for relinquishment.

With this additional brief supplementing the original brief, we submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

CAKE & CAKE,

Attorneys for Respondent.